77-511

IN THE

Supreme Court of the United States

October Term, 1977

No. 384

IN THE MATTER

OF

WILLIS BENEKY,

Petitioner,

against

THE WATERFRONT COMMISSION OF NEW YORK, HARBOR, WILLIAM P. SIRIGNANO, Executive Director,

Respondent.

Petition for a Writ of Certiorari to the Court of Appeals of the State of New York.

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Of Counsel

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AUTHORITY.

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Respondent.

Petition for a Writ of Certiorari to the Court of Appeals of the State of New York.

Petitioner prays that a writ of certiorari issue to review the order of the Court of Appeals of the State of New York, dated and entered on the 30th day of June, 1977.

Citations to Opinion Below.

The memorandum and order of the Appellate Division, First Judicial Department, State of New York, dated October 7, 1976, and entered reversing judgment of special term as set forth in the appendix, annexed hereto as Exhibit A.

The judgment dated and entered on the 29th day of March, 1976, vacating the respondent's determination dismissing petitioner from employment is set forth in the appendix, annexed hereto as Exhibit B.

Jurisdiction.

The judgment of the New York State Court of Appeals, dated the 3rd day of June, 1977, is annexed hereto as Exhibit C.

The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

The Question Presented.

Was petitioner entitled to a fair hearing in regard to charges lodged against him leading to his dismissal from employment and, if he was entitled such a hearing, was petitioner afforded one, and was the determination of the petitioner's employer in violation of his constitutional rights including his rights of freedom of association and rights of procedural due process?

Constitutional Provisions, Statutes, Rules, etc., Involved.

The constitutional provisions involved are the freedom of association clause of the First Amendment, and the due process clause of the Fifth Amendment. The above constitutional provision as well as the record of the termination of petitioner are set forth in the appendix as Exhibit D and Exhibit E, respectively, and these issues were raised by pleadings at each level of proceeding.

Statement.

That in or about February of 1963, petitioner was employed as a special agent by the respondent, Waterfront Commission of New York Harbor, and that petitioner is a police officer in accordance with New York State Criminal Procedure Law, Section 1.20, paragraph 34 (h).

The petitioner, during the entire time prior to the commencement of this litigation, served as President of the Policemen's Benevolent Association of the respondent, Waterfront Commission of New York Harbor, and was a staunch supporter of the creation of labor relations rights for Waterfront employees.

The legislation that created the respondent, and that was initially passed by the States of New York and New Jersey and the United States Congress, made no provision for the collective bargaining rights of Commission employees, even though said rights are enjoyed by the public employees of New York and New Jersey. The primary purpose or goal of the Policemen's Benevolent Association has been, and is, to obtain by agreement or by legislation, the basic rights of representation and collective bargaining for the employees of the Waterfront Commission.

The petitioner spent the entire legislative session of 1975 visiting Albany when his schedule permitted and visited with certain legislative leaders urging the adoption of statutory labor relations procedures for Waterfront Commission employees.

On the 9th day of October, 1975, the Governors of New York and New Jersey, by formal letter to the Waterfront Commission, urged the adoption of labor relations procedures within the Waterfront Commission, as promulgated by a joint committee of the New York and New

Jersey Public Employment Relations Boards. The letter as aforesaid was strongly written and provided an ultimatum that, if the procedures were not accepted by the Commission voluntarily, they would be imposed by legislation. The petitioner was considered by the respondent to be extremely instrumental in the issuance of the aforementioned executive directive (attached hereto as Exhibit F).

On or about the 28th day of October, 1975, the petitioner was summoned to the executive office of the respondent, Waterfront Commission, for no announced purpose and was greeted by Commissioner Joseph Kaitz of New York, Commissioner Ralph DeRose of New Jersey, Executive Director William P. Sirignano, Thomas Jones, Director of Law Enforcement, all of the respondent, Waterfront Commission. The petitioner was interrogated by the Commission representatives, without the aid of counsel, on his association with other union officials, specifically, one Anthony Scotto.

The petitioner admitted meeting with Anthony Scotto, President of the International Longshoremen's Association, 1814, to solicit support for petitioner's position for a scheduled AFL-CIO convention.

This meeting with Mr. Scotto took place at Union Headquarters at the suggestion of Commissioner Louis Valentino, Commissioner of Labor Affairs for the New York State Department of Labor. Commissioner Valentino attempted to appear before the representatives of the respondent in an attempt to explain that the meeting with Mr. Scotto, which lasted approximately five minutes, was scheduled by him (Valentino) and was attended by Beneky at Commissioner Valentino's personal request. Commissioner Valentino was never permitted to appear.

That, at the conclusion of the meeting, the petitioner was advised that he had been summarily fired for casting a cloud over police activities of the respondent, conduct unbecoming a Commission employee and for conduct unbecoming the good order and discipline of the respondent, Waterfront Commission.

That the actions of the respondent had as their sole purpose and motivation the penalizing of petitioner for his efforts as a union leader.

After a rather lengthy submission before the Special Term, Supreme Court, New York County, Judge Gellinoff ruled that the dismissal was "arbitrary, capricious and so grave in its impact on the individual subjected to it, that it is disproportionate to the conduct * * *," and that "the true reason is disapproval of petitioner's organizational activities" (Exhibit B).

Basis for Granting the Writ.

This petition raises substantial and important questions concerning the right of an individual employed by a governmental agency to engage in labor activities and, further, raises questions that relate to, but do not necessarily fall within, the parameters of *Board of Regents of State College v. Roth,* 408 U. S. 564 (1972), and *Codd v. Velger,* 97 S. C. 882 (1977), in regard to the right to a due process hearing of a non-tenured employee.

As previously mentioned herein, the petitioner was president of a policemen's benevolent association, a fraternal organization seeking collective bargaining rights for police officers employed by respondent. On October 9, 1975, the petitioner obtained a dramatic success in this regard, by virtue of the Executive Directive from the Governors of both New York and New Jersey, urging

these rights. In this specific regard, the petitioner engaged in a meeting with Anthony Scotto, President of the International Longshoremen's Association, in the presence of the New York State Commissioner of Labor Affairs, at the specific request of the Commissioner, and during off-duty hours. For this action, petitioner was fired, even though no surveillance of Mr. Scotto was in process at the time of the meeting. Petitioner was given a brief meeting by the respondents and was not permitted to have his primary witness, the New York State Commissioner, testify on his behalf, and petitioner was summarily fired.

It must be remembered that the governors of both states had to threaten the Commission to institute basic rights of its employees, rights the Commission continued to ignore throughout this litigation. The Commission has fired a long-term employee without a hearing once he surfaced as a legitimate labor leader. The Commission has totally destroyed that individual's potential for continued employment in his chosen field without providing him the opportunity to explain or rebut the charges against him. The Commission has been functioning as a power unto itself in defiance of the very governmental bodies from which it derives its power.

The Appellate Division concluded that "• • • petitioner's discharge under the circumstances delineated in this record, does not explicitly or implicitly rest on reasons which would stigmatize him so as to foreclose the opportunity of future employment within the rationale of *Board of Regents of State College v. Roth*, 408 U. S. 564 (1972)."

The Courts below have apparently misconstrued the *Roth* case. In the *Roth* case, the respondent had been hired for a fixed term of one year to teach at a state university in Wisconsin and he was informed without

explanation that he would not be hired for the ensuing year. Roth brought his action claiming that he had been deprived of his constitutional rights since the real reason for the nonrenewal of his contract was his criticism of university administration and he had been deprived of his procedural due process rights, since no reason for his termination had been given. The Court held, on page 573 of the decision, that:

> The State, in declining to rehire the respondent, did not make any charge against him that might seriously damage his standing and associations in his community. It did not base the nonrenewal of his contract on a charge, for example, that he had been guilty of dishonesty, or immorality. Had it done so, this would be a different case. For "*[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential.*" (Emphasis added.)

The Court at that point specifically ruled that, in the *Roth* case, there was no suggestion that Roth's "good name, reputation, honor or integrity" was at stake.

The Court's use of the words in the above mentioned quote, "his community" is worthy of note. That, coupled with the further words on the same page:

> The State, for example, did not invoke any regulations to bar the respondent from all other public employment in state universities.

Certainly, it is reasonable to assume that the use of the word "community" is directed at his employment community, i. e., state universities.

In the instant case, we have an employee who has been terminated as a police officer for consorting with an un-

savory character and for casting a cloud over the integrity of his employer. Can it be denied that further employment as a police officer for the respondent has been rendered impossible and the question must again be posed as to whether or not procedural due process was afforded and as to whether or not the record that does exist in the instant case substantiates the conclusion arrived at by the respondent.

The Court's misconception of the holding in the *Roth* case is more apparent when it is realized that the Court, in the *Roth* case, held on page 575 that:

> It stretches the concept too far to suggest that a person is deprived of "liberty" when he simply is not rehired in one job but remains as free as before to seek another.

In the instant matter, the petitioner was not confronted with the failure to rehire but was terminated from continued employment and is rendered impotent in his chosen field and therefore is not "free" as before to seek another job as a police officer.

On the question of a fair hearing, the *Roth* case is clearly distinguishable from the instant matter and, on page 578, the Court held:

> Thus, the terms of the respondent's appointment secured absolutely no interest in re-employment for the next year. They supported absolutely no possible claim of entitlement to re-employment. Nor, significantly, was there any state statute or University rule or policy that secured his interest in re-employment or that created any legitimate claim to it.

The question must be asked by this Court as to whether petitioner had a property interest sufficient in his continued employment to require a due process hearing on the charges proffered by the respondent.

Throughout the defense by the respondent, terms such as "evil conditions" and "illegal activities" were used in reference to the Beneky firing. The respondent accused Beneky of "compromising" its integrity by meeting with and seeking the help of a subversive personality, Anthony Scotto. In the formal record of Beneky's termination, it was stated that Beneky's activities had cast a "• • • cloud over other special agents • • •" and, furthermore, in a confidential memorandum to the Commission's Executive Director, Sirignano, it was stated that:

> • • • Mr. Beneky's continued employment by the Commission will seriously affect the Commission's law enforcement efforts.

The Commission went so far as to allege in the termination of Beneky that:

> • • • There will be a reluctance on the part of these police departments to share intelligence-type information with this Commission concerning major crime figures • • •

There is nothing in the record to justify any of the conclusions that are presented as reasons for Beneky's termination of employment. There can be no question that the Commission's actions against Beneky have labeled him as a fallen and corrupt police officer. He has passed the age (29) that stands as the maximum qualifying age for police officers. He is obviously foreclosed from any further employment as a police officer and, in all likelihood, is foreclosed from any sensitive work in virtually any area.

The Courts below ruled on all of these matters, and, in fact, ruled on the merits of the discharge after concluding that procedural due process had been provided to the petitioner. However, the record of the hearing and the subsequent actions of the Commission are laden with conclusions and provide no justification for these conclusions.

It is further submitted that the Court below erred in concluding that the record of the hearing comported with procedural due process and was based on substantial evidence. This must be viewed in light of the denial by the respondent of Beneky's request to present statements and/or testimony of his primary witness, Commissioner Louis Valentino.

The Court below, as previously mentioned, stated that procedural due process of law had been afforded to the petitioner in his hearing.

After contemplating the definitions of due process that have withstood the test of time and have been annunciated and reannunciated by Courts all over this land, can one arrive at the conclusion that the brief five minute meeting with no formal notice of stated purposes was, in fact, a "hearing" that afforded petitioner procedural due process? After reviewing the contention of the petitioner that he attended the clandestine meeting with Mr. Scotto during his off duty hours at the behest of the Commissioner of Labor Affairs and in the presence of the Commissioner, can it possibly be concluded on the evidence submitted by the respondent that this meeting has cast a cloud over the integrity of the Waterfront Commission? Petitioner submits that these questions must be answered in the negative.

It is undisputed that on the 28th day of October, 1975, petitioner was called into the office of respondent and was interrogated by the respondent officials and his employment was terminated.

Petitioner was given no opportunity to prepare a case and, in fact, had no knowledge of the purpose of the meeting until he appeared at Commission Headquarters.

During the meeting and only during the meeting did the petitioner discover the basis of his termination, to wit: a meeting during his own hours with another union official and a New York State Commissioner.

It is apparent that the Commission holds itself out as being above and beyond not only the basic labor rights of its employees, but above and beyond the basic human rights of its employees.

That petitioner had a vested right to continued employment that was equivalent to property rights within the meaning of the Constitution of the United States.

That pursuant to the Employees Manual of Organization and Working Conditions, employees of the Commission belong to the New York State Employees Retirement System. That pursuant to Section 76 of the New York State Retirement and Social Security Law, petitioner is a vested member of the retirement system and therefore the respondent's action in wrongfully terminating petitioner's employment has voided petitioner's opportunity to complete his participation in the New York State Retirement System. Petitioner has therefore been deprived of a significant property right.

Petitioner was employed by the respondent for a period in excess of ten years. Furthermore, although respondent continuously avers to the fact that petitioner was an

"at will" employee, respondent totally ignores its own rules and regulations, those rules specifically setting forth two classifications of employees, permanent and probationary. At the expiration of three months, an employee is either terminated or made permanent. It is respectfully submitted that the term "permanent employee" has legal significance and clearly defines petitioner's right to continued employment.

That, although it has been held by the court below that petitioner received an adequate hearing, the petitioner has been deprived of his property interest without adequate notice of any pending charges (e. g., no arraignment) without the benefit of counsel, without the right of confronting witnesses against him and without the right of producing witnesses in his own behalf.

Respondent has continuously alluded to the *Codd v. Velger* case (97 S. C. 882 [1977]), and pointed out that, in that matter, the court ruled that, since Velger had not contested the allegations brought against him, he was not entitled to a hearing, and that the same logic applied in this matter. What the respondent and, apparently, the Court of Appeals have overlooked in this regard is the simple fact that, although petitioner does not dispute that a meeting took place, he clearly disputes that it had any adverse effect on the Commission, as the respondent has alleged, or that it was guised with any taint of impropriety as the Commission alleged. Petitioner's sole witness would have successfully rebutted the allegations concerning the effect on the Commission, and the Commission never was able to sustain its position concerning the adverse effect on the Commission.

Conclusion.

For the reasons stated above, petitioner respectfully submits that this petition for a writ of certiorari be granted.

Respectfully submitted,

ALLEN R. MORGANSTERN,
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Mineola, N. Y. 11501
(516) 742-9000.

HARTMAN, MORGANSTERN & LERNER,
Of Counsel.

Exhibit A—Memorandum Decision by the Appellate Division—First Department.

Stevens P.J.

Markewich
Lupiano
Silverman
Lynch JJ.

(3145)

In re Application

of

Willis Beneky,

Petitioner-Respondent,

For an Order pursuant to Article 78 of the Civil Practice Law and Rules,

against

The Waterfront Commission of New York Harbor, etc.,

Respondent-Appellant.

R. A. Mauro.
I. Malchman.

Judgment, Supreme Court, New York County (Gellinoff, J.) entered March 29, 1976 which granted the petition to the extent of vacating respondent's determination dismissing the petitioner and remanding the matter for further proceedings, unanimously reversed, on the law, and vacated, and the petition dismissed, without costs and without disbursements.

Petitioner as a non-tenured employee was not entitled to a full adversary hearing and was accorded the disciplinary procedure mandated by respondent's rules and regulations pertaining to non-tenured law enforcement agents. The hearing before the Commissioners at which petitioner was given an opportunity to be heard and of which he, in effect, had sufficient notice, comported with procedural due process. Further, petitioner's discharge, under the circumstances delineated in this record, does not explicitly or implicitly rest on reasons which would stigmatize him so as to foreclose the opportunity of future employment within the rationale of *Board of Regents of State College v. Roth,* 408 U. S. 564 (1972). There is no sufficient showing that the petitioner's discharge was in bad faith, and the punishment imposed, to wit, discharge, is under all the circumstances herein and having due regard for the sensitive position in which petitioner was employed, not "so disproportionate to the offense • • • as to be shocking to one's sense of fairness" (*Matter of Pell v. Bd. of Education,* 34 N. Y. 2d 222, 233 [1974]).

Order filed.

Exhibit A, Continued—Appellate Division Order of Reversal.

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on October 7, 1976

Present—

Hon. Harold A. Stevens,
Presiding Justice,
Arthur Markewich,
Vincent A. Lupiano,
Samuel J. Silverman,
J. Robert Lynch,
Justices.

In the Matter of the Application

of

Willis Beneky,

Petitioner-Respondent,

For an Order Pursuant to Article 78 of the Civil Practice Law and Rules,

against

The Waterfront Commission of New York Harbor, William P. Sirignano, Executive Director,

Respondent-Appellant.

3145

An appeal having been taken to this Court by the respondent-appellant from the judgment of the Supreme

Court, New York County (Gellinoff, J.), entered on March 29, 1976, which granted the petition to the extent of vacating respondent's determination dismissing the petitioner and remanding the matter for further proceedings, and said appeal having been argued by Mr. Irving Malchman of counsel for the appellant, and by Mr. Reynold A. Mauro of counsel for the respondent; and due deliberation having been had thereon, and upon the memorandum decision of this Court filed herein,

It is unanimously ordered that the judgment so appealed from be and the same is hereby reversed, on the law, and vacated, without costs and without disbursements. The Clerk is directed to enter judgment in favor of respondent-appellant dismissing the petition.

Enter:

(Illegible.)
Clerk

Exhibit B—Judgment.

At a Special Term, Part I of the Supreme Court of the State of New York, held in and for the County of New York, at the Courthouse thereof, 60 Centre Street, Borough of Manhattan, City and State of New York, on the 29 day of March, 1976.

Present:

Hon. Abraham J. Gellinoff, Justice.

IN THE MATTER OF THE APPLICATION

OF

WILLIS BENEKY,

Petitioner,

For an Order Pursuant to Article 78 of the Civil Practice Law and Rules,

against

THE WATERFRONT COMMISSION OF NEW YORK HARBOR, William P. Sirignano, Executive Director,

Respondent.

Calendar No. 137
Index Number: 19219/75

WILLIS BENEKY, by his attorneys, Hartman & Alpert, having commenced a special proceeding pursuant to Article 78 of the CPLR for a judgment declaring the determination of the Respondent in terminating Petitioner's

employment without a hearing and without sufficient evidence of wrongdoing as being in violation of lawful procedure effected by error of law and being arbitrary, capricious and an abuse of discretion, including an abuse of discretion as to the measure or mode of penalty of discipline imposed, and annulling and reversing the determination of Respondent terminating Petitioner's employment, and the Respondents having duly appeared and answered by Irving Malchman, Esq., and said proceeding having regularly having come to be heard before The Hon. Abraham J. Gellinoff without jury at a Special Term of this Court held in the Courthouse thereof, 60 Centre Street, Borough of Manhattan, City and State of New York on the 7th day of November, 1975, and the issues in the above entitled proceeding having duly come on to be heard and the Petitioner having duly appeared by Hartman & Alpert, Esqs., his attorneys, and the Respondent having appeared by Irving Malchman, Esq., and the proofs of both parties having been adduced and their counsel having been heard, and after due deliberation having been held thereon and a decision of this Court having been made therein on the 27th day of January, 1976 in favor of the Petitioner and against the Respondents directing an entry of Judgment as herein provided,

Now on reading and filing the Order to Show Cause dated October 31, 1975 and Verified Petition of the Petitioner, Willis Beneky, dated and verified October 28, 1975; the affirmation of Reynold A. Mauro, Esq. dated October 30, 1975; the supplemental affirmation of Reynold A. Mauro, Esq. dated November 12, 1975; the affidavit of Louis Valentino sworn to November 14, 1975; the Respondent's Answer dated and verified November 6, 1975; the affidavit of Thomas F. Jones sworn to on November 6, 1975; and the supplemental affidavit of Thomas F. Jones, sworn to on November 19, 1975; the supplemental affidavit

of Thomas J. Galligan, sworn to on November 18, 1975 all with due proof of service in support of said pleadings, and due deliberation having been had thereon and upon filing the opinion of this Court, it is

ORDERED, ADJUDGED AND DECREED that the Petitioner's application is granted to the extent of vacating the determination dismissing Petitioner and remanding the matter to the Respondent for further proceedings not inconsistent with the decision of this Court.

Enter

/s/ ABRAHAM J. GELLINOFF
J. S. C.

Exhibit C—Memorandum of the Court of Appeals, State of New York.

COURT OF APPEALS,

STATE OF NEW YORK.

1 No. 384

IN THE MATTER

OF

WILLIS BENEKY,

Appellant,

vs.

THE WATERFRONT COMMISSION OF NEW YORK HARBOR, William P. Sirignano, Executive Director,

Respondent.

(384) Reynold A. Mauro, Mineola, for appellant.
Irving Malchman & Richard Paul Cohen, NY City, for respondent.

MEMORANDUM:

The order of the Appellate Division should be affirmed, with costs. Petitioner, an investigator for the Waterfront Commission, concedes that he met with a reputed organized crime figure, who had been a target of numerous investigations by the Commission, and that this meeting did not occur in the regular course of his employer's business. As a non-tenured employee, petitioner was not entitled to a full adversary hearing concerning the reasons for the termination of his employment unless there was proof that the discharge was for an improper reason or in bad faith.

(See, e. g., *Matter of Anonymous v. Codd,* 40 N. Y. 2d 860; *Matter of Bergstein v. Board of Educ.,* 34 N. Y. 2d 318, 322; *Board of Regents v. Roth,* 408 U. S. 564.) But, here, the proof failed to show improper motivation or bad faith and, thus, no hearing was required. In fact, the Commission did more than it was required to do, under the Constitution and its own rules, by granting petitioner an opportunity to examine the reports which charged him with improper conduct and by permitting him to explain his actions. As to the claim that a hearing was necessary in view of the stigma attaching to the termination of his employment, it is sufficient to note that no hearing is necessary where the employee fails to "affirmatively" challenge "the substantial truth of the material in question." (*Codd v. Velger,* U. S. , 97 S. Ct. 882, 884.)

Order affirmed, with costs, in a memorandum. All concur.

Decided June 30, 1977

EXHIBIT D--CONSTITUTION OF THE UNITED STATES, ARTICLES IN ADDITION TO, AND AMENDMENTS.

ARTICLES IN ADDITION TO, AND AMENDMENT OF, THE CONSTITUTION OF THE UNITED STATES OF AMERICA, PROPOSED BY CONGRESS, AND RATIFIED BY THE SEVERAL STATES, PURSUANT TO THE FIFTH ARTICLE OF THE ORIGINAL CONSTITUTION.[1]

AMENDMENT [I] [2]

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

1 In Dillon v. Gloss, 256 U.S. 368, 41 S.Ct. 510, 65 L.Ed. 994 [1921], the Supreme Court stated that it would take judicial notice of the date on which a State ratified a proposed constitutional amendment. Accordingly the Court consulted the State journals to determine the dates on which each house of the legislature of certain States ratified the 18th Amendment. It, therefore, follows that the date on which the governor approved the ratification, or the date on which the secretary of state of a given State certified the ratification, or the date on which the Secretary of State of the United States received a copy of said certificate, or the date on which he proclaimed that the amendment had been ratified are not controlling. Hence, the ratification date given in the following notes is the date on which the legislature of a given State approved the particular amendment (signature by the speaker or presiding officers of both houses being considered a part of the ratification of the "legislature"). When that date is not available, the date given is that on which it was approved by the governor or certified by the secretary of state of the particular State. In each case such fact has been noted. Except as otherwise indicated information as to ratification is based on data supplied by the Department of State.

2 Brackets enclosing an amendment number indicate that the number was not specifically assigned in the resolution proposing the amendment. It will be seen, accordingly, that only amendments XIII, XIV, XV and XVI were thus technically ratified by number. The first 10 amendments along with 2 others which failed of ratification were proposed by Congress on September 25, 1789, when they passed the Senate [1 Ann.Cong. (1st Cong., 1st sess.) 90], having previously passed the House on September 24 [Id., 948]. They appear officially in 1 Stat. 97. Ratification was completed on December 15, 1791, when the eleventh State (Virginia) approved these amendments, there being then 14 States in the Union.

The several State legislatures ratified the first 10 amendments to the Constitution (i.e. nos. 3 to 12 of those proposed) on the following dates: New Jersey, Novem-

AMENDMENT [II.]

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

AMENDMENT [III.]

No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

AMENDMENT [IV.]

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT [V.]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

ber 20, 1789; Maryland, December 19, 1789; North Carolina, December 22, 1789; South Carolina, January 19, 1790; New Hampshire, January 25, 1790; Delaware, January 28, 1790; New York, February 27, 1790; Pennsylvania, March 10, 1790; Rhode Island, June 7, 1790; Vermont, November 3, 1791; Virginia, December 15, 1791. The two amendments which failed of ratification (i.e. nos. 1 and 2 of those proposed) prescribed the ratio of representation to population in the House, and specified that no law varying the compensation of members of Congress should be effective until after an intervening election of Representatives. The first was ratified by 10 States (1 short of the requisite number) and the second by 6 States [3 Doc. Hist. Const., 325-390]. (Constitution of United States of America 1938, Library of Congress, Legislative Reference Service.)

Exhibit E—Memorandum.

To:

Thomas F. Jones, Director, Division of Law Enforcement

From:

Thomas J. Galligan, S/SA

Subject:

Anthony Scotto Newspaper Article in Daily News Oct. 26, 1975. Interview with S.A. Willis Beneky on 10/27/75

On 10/27/75 at 9:10 A.M. S/SA T. J. Galligan had a telephone conversation with S/A Beneky regarding an article in the Daily News on Oct. 26, 1975.

S/A Beneky was asked if he read the article in the Daily News yesterday (Sunday, 10/26/75) where Scotto made comments about Waterfront Commission agents.

Beneky said yes he did.

He was asked if he had any conversations or meetings with Anthony Scotto or any union representative relative to the article. He said he did.

He (Beneky) was asked when it took place. He said the Friday before last. When asked could it be Oct. 17th, he said he didn't have a calendar. It was suggested that Oct. 17th was the Friday before last. He said wait I have a calendar and he verified that it was Oct. 17th.

He (Beneky) was asked where the meeting took place. He said at the N.Y. Shipping Association office. Asked if he meant the Broad St. location, he said yes.

He (Beneky) was asked why he met with Scotto. He said he was asking for his support of the AFL-CIO resolution to support a Waterfront Commission PBA union.

Beneky added that Gov. Carey's report to the WC had already come down earlier in the week prior to his meeting with Scotto.

In view of the fact that the article cast a "cloud" over other special agents, particularly those S/A's who had done surveillances of Scotto along with Beneky, he was asked if he was going to speak to the officers of the Commission and tell them of his conversation with Scotto. He (Beneky) said no, why should I? I can't be accountable for special agents 24 hours a day who may have spoken to Scotto also.

WATERFRONT COMMISSION OF NEW YORK HARBOR

Oct. 28, 1975

To:

Commissioners Joseph Kaitz, Ralph C. DeRose and Executive Director William P. Sirignano

From:

Thomas F. Jones, Director, Division of Law Enforcement

Subject:

Special Agent Willis Beneky

On October 26, 1975 the New York Sunday News printed an article headlined "Agents Tailing Scotto Get His Aid For Union." The article, in essence, states that Mr. Scotto helped out Waterfront Commission Agents in their battle to obtain union recognition despite the fact that he, Mr. Scotto, was being investigated by the same agents that he helped.

An inquiry was made on Monday morning, October 27th, by Supervising Special Agent Thomas Galligan in an effort to determine if members of this division had, in fact, contacted Anthony Scotto as set forth in the newspaper article. It is to be noted that in connection with an official investigation of this Commission Special Agents of the division had been assigned during the month of June 1975 to conduct surveillances and report on the activities of Anthony Scotto. Since the article intimated that agents who were assigned to a survelliance of Mr. Scotto had contacted Mr. Scotto, all of the Special Agents who had been assigned to this specific surveillance were interviewed by Mr. Galligan. All of the Special Agents except one stated that they had no personal contact with Mr. Scotto and had at no time approached him or been in the presence of any member of the division who had approached Mr. Scotto for assistance in any matter. Special Agent Willis Beneky, who had been assigned to this surveillance on nine days during the period of the surveillance, advised Mr. Galligan that on Friday, October 17, 1975 he visited Mr. Scotto at the offices of the New York Shipping Association, 80 Broad St., New York City, and requested Mr. Scotto's support for an AFL-CIO resolution to support the Waterfront Commission PBA. It is to be noted that on October 17, 1975, at the request of the Executive Director, Mr. Beneky, accompanied by Special Agents Urgovitch, Galler and Dennis Curran, met with the Executive Director and the writer on PBA matters.

In view of the fact that the three special agents mentioned above were in Mr. Beneky's company on Friday, October 17th, Supervising Special Agents Galligan and Stivala interviewed these three special agents, all of whom advised that they had never visited with Mr. Scotto nor were they aware of the fact that Mr. Beneky had either met with Mr. Scotto or planned to meet with Mr. Scotto on the day that they were present at 150 William Street. These three special agents, all of whom are elected officers

of the Waterfront Commission PBA, further advised that to the best of their knowledge none of the PBA members were aware that Mr. Beneky had met with Mr. Scotto concerning their cause.

There is no question in my mind that Mr. Beneky's action in meeting with Mr. Scotto has seriously compromised the effectiveness of the Waterfront Commission, and more specifically the members of the Division of Law Enforcement. The members of this division have received reactions from ranking police officers of other departments who are fearful that ongoing joint investigations may have been compromised, which reactions lead me to believe that there will be a reluctance on the part of these Police Departments to share intelligence-type information with this Commission concerning major crime figures. This reluctance can be directly attributed to Mr. Beneky's action. Messrs. Galligan and Winthers, and the writer, wish to advise that we have absolutely no confidence in Mr. Beneky's future effectiveness as a law enforcement officer assigned to this division.

Chapter 4 of the manual of Rules and Regulations, a copy of which was issued to Mr. Beneky, prohibits—(4:10) conduct unbecoming a Commission employee; (4:11) conduct contrary to good order and discipline, both of which sections Mr. Beneky has violated, in my opinion.

In view of the foregoing, I recommend that Mr. Beneky's services as a Special Agent of the Waterfront Commission assigned to the Division of Law Enforcement be terminated effective the close of business Tuesday, October 28, 1975.

WATERFRONT COMMISSION OF NEW YORK HARBOR

October 28, 1975

To:

The Commissioners

From:

William P. Sirignano, Executive Director

CONFIDENTIAL

I approve the recommendation of Director Thomas Jones. Our Agents occupy a very sensitive position, not only do they have access to our confidential information and files but also the information from sister law enforcement agencies.

Mr. Scotto has and continues to be the subject of investigations by the Waterfront Commission and also state and federal law enforcement agencies. To approach the subject of an investigation and ask for assistance, places the Commission in a position whereby Mr. Beneky's continued employment by the Commission will seriously effect the Comimssion's law enforcement efforts.

Exhibit F—Letter, Dated October 9, 1975.

October 9, 1975

Waterfront Commission of
New York Harbor
15 Park Row
New York, New York 10038

Gentlemen:

Enclosed is the final Report of the Joint Gubernatorial Committee on Employee Relations of the Port Authority of New York and New Jersey and the Waterfront Commission of New York Harbor.

The report consists of procedures for adoption by the agencies.

We urge you to adopt and promulgate the procedures as proposed by the Committee. If these proposals are accepted voluntarily, implementing legislation (other than the removal of statutory immunity) will not be necessary.

The highlights of the recommendations of the Committee are set forth in the attachment.

Sincerely,

BRENDAN T. BYRNE
Governor of New Jersey

HUGH L. CAREY
Governor of New York

Enclosures

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

77-

No. 511

IN THE MATTER

OF

WILLIS BENEKY,

Petitioner,

against

THE WATERFRONT COMMISSION OF NEW YORK HARBOR,
WILLIAM P. SIRIGNANO, Executive Director,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION

IRVING MALCHMAN
Director of Litigation and Research
of the Waterfront Commission of
New York Harbor
Attorney for Respondent
150 William Street
New York, New York
212-964-3520

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Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION

The respondent herein, the Waterfront Commission of New York Harbor, submits this brief in opposition for the purpose of bringing to the attention of the Court the fact that the petition for certiorari herein is out of time and accordingly is required to be denied. The decision of the Court of Appeals of the State of New York sought to be reviewed is dated June 30, 1977 (Ex. C to petition, p. 22). The remitttitur of the Court of Appeals is also dated June 30, 1977 (Appendix A, *infra*). Hence, the judgment of the Court of Appeals sought to be reviewed was entered June 30, 1977.

The petition was thus required to be filed with this Court ninety days after June 30, 1977 (28 U.S.C., § 2101(c)), that is, on or before September 28, 1977. However, the petition was not in fact filed with this Court until September 30, 1977. Accordingly, as stated, the petition is untimely and is therefore required to be denied.

Respectfully submitted,

IRVING MALCHMAN
Director of Litigation and Research
of the Waterfront Commission of
New York Harbor
Attorney for Respondent
150 William Street
New York, New York
212-964-3520

Dated: October 14, 1977

APPENDIX A

Remittitur.

COURT OF APPEALS
STATE OF NEW YORK

1

No. 384

In the Matter of
Willis Beneky,

Appellant,

vs.

The Waterfront Commission of New York Harbor,
William P. Sirignano, Executive Director,

Respondent.

The apellant(s) in the above entitled appeal appeared by Hartman & Alpert; the respondent(s) appeared by Irving Malchman.

The Court, after due deliberation, orders and adjudges that the order is affirmed, with costs, in a memorandum. All concur.

The Court further orders that the papers required to be filed and this record of the proceedings in this Court be remitted to the Supreme Court, New York County, there to be proceeded upon according to law.

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

DONALD M. SHAW
Deputy, Clerk of the Court

Court of Appeals, Clerk's Office, Albany, June 30, 1977.